Supreme Court, U.S.
FILED
AUG 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CRISPUS NIX, Warden of
the Iowa State Penitentiary,

Petitioner,

v.

EMMANUEL CHARLES WHITESIDE,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether criminal defense lawyers provide ineffective assistance of counsel by persuading their client not to commit perjury at his trial when their successful effort to prevent him from lying on the stand wins unanimous praise from the state supreme court and the conduct of the attorneys does not prejudice their client at trial.

2. Whether criminal defense lawyers, who, as officers of the court, admonish their client that they will take steps necessary to prevent him from committing perjury, violate their client's right to testify when the client subsequently abandons the perjury scheme and takes the stand in his own defense.

3. Whether criminal defense lawyers, who privately and confidentially persuade their client not to commit perjury on the stand, act in a fashion which causes a violation of their client's right to due process of law when the judge and jury at his state court trial are not informed of the defendant's abandoned perjury plan.

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CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law . . .

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

Fourteenth Amendment, United States Constitution

> No State . . . shall . . . deprive any person of life, liberty, or property without due process of law.

STATEMENT OF FACTS

Testimony at Petitioner's trial established that Emmanuel Whiteside and two companions, Terry Fowler and Derrick Doolin, went to the apartment of the victim, Calvin Love, and his girlfriend, Kathy Sauer, to obtain some marijuana. (App. p. 12). While there, an argument ensued about the marijuana and Love, who was lying on a bed, stated at least once that Sauer should get his "piece." (App. p. 12, 16-17, 36, 43, 49). At one point, Love got up, went to a different part of the room and then returned to the bed. (App. p. 16). Then, Love made a move to get off his bed moving toward Whiteside. (App. pp. 36-7, 42-3). A scuffle ensued and Love was fatally stabbed in the chest by Whiteside. (App. p. 42-5, 49-51). Sauer than gave Whiteside the marijuana and the trio left. (App. p. 15).

Testimony also showed that the room where the stabbing occurred was poorly lighted (App. pp. 34-5), that Love had a reputation for carrying weapons and that he was intoxicated the night he was killed. (App. p. 50). It was also established that Sauer and Love's family broke

the padlock off his apartment door and removed everything, including the carpet, the next morning. (App. pp. 8-9, 20-21). Police officers had conducted a "cursory search" of the premises after Love had been removed by ambulance attendants. (App. pp. 26-27).

A major point of controversy was whether Love reached under his pillow just prior to getting off the bed when he was stabbed. Kathy Sauer was not sure where Love's hands were. (App. pp. 21-22). Fowler stated Love did not place them under the pillow while Whiteside and Doolin stated that he did put his hands under the pillow prior to getting up. (App. pp. 38-39, 44-45, 49). Doolin, Fowler and Whiteside all testified that they thought Love had a gun but none stated that they saw one. (App. pp. 36, 45, 49-51).

At the hearing on Whiteside's Motion for a New Trial, Whiteside testified that when Attorney Robinson first visited him, he gave Robinson a written summary of the event that stated that he saw a gun in Love's hands. (Pet. App. A62-69)). He stated that after no gun was found, Robinson told him he would withdraw if he claimed he actually saw a gun. (Pet. App. A70-72). He agreed to testify that he only thought Love had a gun based on the threat and that he felt, based on Robinson's assurances, it would all work out. (Pet. App. A74-75).

Gary Robinson testified that, after reading Whiteside's statement, Whiteside stated that he did not really see the gun and that Whiteside acquiesced in the strategy of trying to "create" a gun. (Pet. App. A77-79). He stated that, when it became clear that a gun could not be found, Whiteside insisted on testifying he saw a gun. (Pet. App. A84-87). Robinson said he told Whiteside he could not condone perjury, that if he testified he saw a gun he would withdraw, inform the court of the perjury and be available

as a rebuttal witness. (Pet. App. A84-88). He stated that his threats caused Whiteside to testify as he did. (Pet. App. A89). Attorney Donna Paulsen testified to essentially the same things as Robinson.

The trial court, in overruling Defendant's Motion for New Trial, stated: "I find the facts to be as testified to by Ms. Paulsen and Mr. Robinson." (App. 56-57).

Petitioner's recital of the procedural history of the case is adopted as essentially correct. (Brief, pp. 7-8).

SUMMARY OF ARGUMENT

A resolution of the problem of client perjury requires consideration of a number of values fundamental to the American system of jurisprudence. They include: (1) the value of truth seeking in the trial process; (2) the fundamental right to the assistance of counsel which requires loyalty, advocacy and confidentiality by the attorney; (3) the role of the jury in deciding what the truth is after skillfull advocacy and cross-examination by the parties' attorneys at trial.

Based on the values set out, it is necessary, as an initial matter, that counsel be convinced, at least, beyond a reasonable doubt that a defendant is going to commit perjury. Short of an explicit admission by the client, which counsel did not have here, the conclusion that perjury will be committed is never warranted.

However, as the Court of Appeals recognized, even if perjury was going to be committed in this case, trial counsel's response was not justified. Counsel experienced a conflict of interest which caused him to threaten to abandon his roles as zealous advocate and confidant of his client based on his desire to comply with what he believed his profession's ethical rules required. Counsel's threats to

withdraw from representation, inform the trial judge and testify against his client overstepped his role as set out above and left his client without the assistance of conflict-free counsel. Thus, the Court of Appeals correctly applied the presumption of prejudice in overturning the conviction. *See Holloway* v. *Arkansas*, 435 U.S. 475, 489, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 425, 437 (1978).

In addition, counsel's threats violated his client's rights to due process, a fair trial and the effective assistance of counsel by conditioning his client's constitutional right to counsel on restrictions counsel placed on his client's constitutional right to testify. This was especially effective in this case where the client had been told he would not be allowed further, substitute counsel.

This Court must affirm the well reasoned decision of the Court of Appeals to grant Emmanuel Whiteside habeas corpus relief.

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT TRIAL COUNSEL'S THREATS TO WITHDRAW FROM RESPONDENT'S CASE, INFORM THE TRIAL JUDGE AND TESTIFY AGAINST RESPONDENT IF RESPONDENT GAVE TESTIMONY TRIAL COUNSEL BELIEVED TO BE PERJURED, EVIDENCED AN ACTUAL CONFLICT OF INTEREST AND INEFFECTIVE ASSISTANCE OF COUNSEL WHICH JUSTIFIED A PRESUMPTION OF PREJUDICE SUFFICIENT TO JUSTIFY HABEAS CORPUS RELIEF.

Petitioner premises his attack on the Court of Appeals' decision on what he characterizes as four key facts which assertedly vindicate trial counsel's actions. Briefly, they are: (1) Respondent did, in fact, intend to commit perjury;

(2) Neither the judge nor the jury was made aware of trial counsel's "admonitions"; (3) The only result was prevention of perjury and, thus, Respondent was not prejudiced; (4) Respondent did not complain regarding trial counsel's actions until after the verdict was rendered and, thus, his motives are suspect. (Pet's. Brief, pp. 11-13). However, a correct analysis of the facts involved and the values at stake in this litigation show that these four assertions are either irrelevant to the issues at hand or are unsupported by the record when read as a whole. A review of the constitutional and societal values implicated, as expressed through the United States Constitution and this Court's decisions, is the necessary starting point.

Petitioner begins his legal analysis by stating that the right to the effective assistance of counsel is based on the desirability of accurate verdicts at trial. (Pet's. Brief, p. 14). Though this is certainly a major goal of that right, Petitioner's constricted reading of that fundamental right and the conclusions he draws fail to even advance the interest he espouses.

First, it is well established that the due process right to counsel in criminal cases includes the right to the "guilding hand of counsel at every step in the proceeding against him." *Powell* v. *Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158, 170 (1932). This includes not only assistance at trial but also involves assistance in the decision whether to proceed to trial at all. *See North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 167, 27 L.Ed.2d 162, 171 (1970); *McMann* v. *Richardson*, 397 U.S. 759, 769-71, 90 S.Ct. 1441, 1448-9, 25 L.Ed.2d 763, 772-3 (1970).[1] Further, and perhaps most important in the vast

[1] The large percentage of guilty pleas to criminal charges was recognized in *Brady* v. *United States*, 397 U.S. 742, 752, -90 S.Ct. 1463, 1471, 25 L.Ed.2d 747, 758-9, N. 10 (1970).

majority of cases, a defendant is entitled to the effective assistance of counsel at sentencing. *See Strickland* v. *Washington*, U.S. ____, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, (1984).

In order for counsel to competently perform this role, it is necessary that both client and counsel be able to rely on the attorney-client privilege. *See Upjohn* v. *United States*, 449 U.S. 383, 390, 101 S.Ct. 677, 683, 66 L.Ed.2d 584, 592 (1981). Because of this necessity, it is not surprising that Courts of Appeals have recognized that the privilege is part of the constitutional right to counsel. *See United States* v. *Brugman*, 655 F.2d 540, 546 (4 Cir. 1981); *Mastrian* v. *McManus*, 554 F.2d 813, 821 (8 Cir. 1977); *United States* v. *Rosner*, 485 F.2d 1213, 1224 (2 Cir. 1973). Moreover, it appears that this Court has, at least, implied that the attorney-client privilege has constitutional underpinnings.[2] *Weatherford* v. *Bursey*, 429 U.S. 545, 552-4, 97 S.Ct. 837, 842-3, 51 L.Ed.2d 30, 38-39 (1977); *Geders* v. *United States*, 425 U.S. 80, 88-89, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592, 599 (1976); *Hoffa* v. *United States*, 385 U.S. 293, 306-7, 87 S.Ct. 408, 416, 17 L.Ed.2d 374, 384-5 (1966).

Geders is especially noteworthy because, there, the Court held that the trial court erred in forbidding consultation between client and counsel during an overnight recess called during defendant's testimony. The Court reached this result despite claims that the truth seeking process might suffer as a result of this consultation.

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[2] Even if only seen as a testimonial exclusionary rule, the attorney-client privilege is, ". . . a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Trammel* v. *United States*, 445 U.S. 40, 50, 100 S.Ct. 966, 912, 63 L.Ed.2d 186, 195 (1980).

Geders, 425 U.S. at 89-91, 96 S.Ct. at 1336-37, 47 L.Ed.2d at 599.

Geders is but one of a number of occasions where members of this Court have found that other interests must be served aside from the truth seeking process. This is especially apparent where freedom from compelled self-incrimination and the right to counsel are involved. For example, in *New Jersey* v. *Portash*, 440 U.S. 450, 458-60, 99 S.Ct. 1292, 1297, 59 L.Ed.2d 501, 509-10 (1979), the Court held that a criminal defendant could not be impeached with testimony given before a grand jury under grant of immunity. The Court distinguished cases such as *Harris* v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) and *Oregon* v. *Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975), where the court had approved impeachment of a testifying defendant with statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), by pointing out that where the privilege against compelled self-incrimination, "in its most pristine form," is involved, the Court will not balance that protection against the "strong policy against countenancing perjury." Justice Powell, in his concurring opinion in Portash, (joined by Rehnquist, J.), 440 U.S. at 463, 99 S.Ct. at 1299, 59 L.Ed.2d at 512-13, underscored the subservience of the truth seeking function to this right:

> "The Court today recognizes, however, that the privilege against self-incrimination protects against more than just the use of false or inaccurate statements against a criminal defendant. In addition, the Fifth Amendment, by virtue of its incorporation through the Fourteenth Amendment, prohibits a State from using compulsion to extract truthful information from a defendant, when that information is to be used later in obtaining the individual's conviction."

In *Brooks* v. *Tennessee*, 406 U.S. 605, 609-13, 92 S.Ct. 1891, 1893-5, 32 L.Ed.2d 358, 362-5 (1972), this Court invalidated a State statue which required a criminal defendant to testify as the first defense witness or not at all on both compelled self-incrimination and right to counsel grounds.[3] *Brooks* is important because not only does it explicity recognize that these rights are of greater importance than the value of truth seeking,[4] it also points out that, ". . . our adversary system reposes judgment of the credibility of all witnesses in the jury." *Brooks*, 406 U.S. at 611-12, 92 S.Ct. at 1894-5, 32 L.Ed.2d at 363.

The fundamental role of the jury as the ultimate fact-finder in the American criminal justice system is completely ignored in Petitioner's analysis. Yet, the issue presented cannot be decided without consideration of, ". . ., the essential feature of a jury . . . in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or inno-

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[3] Justice Stewart only joined the majority in Part II of the opnion, (due process right to counsel). *Brooks*, 406 U.S. at 613, 92 St.Ct. at 1895, 32 L.Ed.2d at 364.

[4] The role of defense counsel in the trial process was best explained by Justices White, Harlan and Stewart in their partial concurrences in *United States* v. *Wade*, 388 U.S. 218, 256-7, 87 S.Ct. 1926, 1947-8, 18 L.Ed.2d 1149, 1174 (1967):

> But defense has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case.

cence." *Williams* v. *Florida*, 399 U.S. 78, 100, 90 S.Ct. 1893, 1906, 26 L.Ed.2d 446, 460 (1970).

Simply put, our system of jurisprudence requires that prosecutors conscientiously and independently perform their roles of enforcing the laws and convicting the guilty. Prosecutors have received judicial protection in the performance of those duties. *Imbler* v. *Pachtman*, 424 U.S. 409, 424-7, 96 S.Ct. 984, 992-3 47 L.Ed.2d 128, 140-1 (1976). An important determination in the grant of that protection is that, ". . . it is very difficult if not impossible for attorneys to be absolutely certain of the objective truth or falsity of the testimony which they present." *Imbler*, 424 U.S. at 440, 96 S.Ct. at 999, 47 L.Ed.2d at 149, (concurring opinion of White, J.).[5] Defense counsel's role is to represent the client zealously[6] and "marshal the evidence into a coherent whole consistent with the best case on behalf of the defendant." *Argersinger* v. *Hamlin*, 407 U.S. 25, 46, 92 S.Ct. 2006, 2017, 32 L.Ed.2d 530, 543 (1972), (concurring opinion of Powell, J.). A meaningful right to trial by jury depends on this. *Id.* It is the jury's function to decide who is telling the truth after the parties have presented their witnesses, with guidance of counsel, and subjected them to the skilled cross-examination of their adversary's attorney. *Jackson* v. *Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979); *Hoffa* v. *United States*, 385 U.S. at 311, 87 S.Ct. at 418, 172 Ed.2d at 387; *Glasser* v. *United States*, 315 U.S. 60, 77, 62 S.Ct. 457, 468, 86 L.Ed. 680, 703 (1942). *See Pointer* v. *Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13

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[5] Imbler clearly recognizes that it is up to the jury, not the attorneys, to resolve which witnesses are telling the truth. *Imbler*, 424 U.S. at 426, 96 S.Ct. at 993, 47 L.Ed. 2d at 141.

[6] See *Maness* v. *Meyers*, 419 U.S. 449, 466-7, 95 S.Ct. 584, 595, 42 L.Ed.2d 574, 588 (1975).

L.Ed.2d 923, 926 (1965).[7] There is simply no need for defense counsel to ". . .appear (to the Defendant) as but another arm of the Government that has proceeded against him." *Baldwin* v. *New York*, 399 U.S. 66, 72, 90 S.Ct. 1886, 1890, 26 L.Ed.2d 437, 442 (1970).

As will be seen below, when the interest in truth seeking is considered with the constitutional right to counsel and the role of the jury as the ultimate factfinder, there can be no other conclusion than that trial counsel's actions in this case were unjustified and the Court of Appeals was correct in granting Respondent habeas corpus relief.

A. Even Assuming Respondent Was Going To Commit Perjury, Trial Counsel's Actions Were Not Warranted.

Petitioner makes much of the contention that this Court must accept the fact that Respondent was going to perjure himself and, as a result, trial counsel's response to this problem was constitutionally acceptable. Respondent does not concede that *Summner* v. *Mata*, 449 U.S. 449 U.S. 539, 544-5, 101 S.Ct. 764, 767, 66 L.Ed.2d 722, 729-30 (1980) dictates that this finding is "fairly supported by the record." This is true because, first, whether counsel had the requisite level of knowledge to conclude that a client is going to commit perjury is, at least, a mixed question of law or fact to which the presumption of correctness does not apply. *Butler* v. *United States*, 414 A.2d 844, 849 (C.A.D.C. 1980); See *Cuyler* v. *Sullivan*, 446 U.S. 335, 342, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333, (1980).[8]

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[7] Juror's ability to perform this task was explicity recognized in *Duncan* v. *Louisiana*, 391 U.S. 145, 156-7, 88 S.Ct. 1444, 1451-2, 20 L.Ed.2d 491, 499-501 (1968).

[8] This would be especially true if, as Petitioner argues, a client intent on perjury waives his or her right to counsel. (Pet's Brief, p. 39). See *Brewer* v. *Williams*, 430 U.S. 387, 403-4, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424, 439 (1977).

Second, the claim that Whiteside was going to perjure himself is not fairly supported in the record based on the fact that Whiteside initially indicated to counsel that a gun was present, (App. p. 55), and merely acquiesced in counsel's strategic decisions that the weapon's presence was irrevelant until shortly before trial. (Pet. App. pp. 77-9, 84-87). Mere inconsistencies in a client's confidential statements to counsel do not justify a conclusion that perjury is to be committed. *Butler*, 414 A.2d at 849-50, citing *Johnson* v. *United States*, 404 A.2d 162, 164 (C.A.D.C. 1979). See *United States ex rel Wilcox* v. *Johnson*, 555 F.2d 115, 121 (3 Cir. 1977). Any uncertainty as to which version is accurate must be resolved in favor of the client and submitted to the factfinder. E.C. 7-6 and 7-26 of the Iowa Code of Professional Responsibility for Lawyers. *See Imbler*, 424 U.S. at 427, 96 S.Ct. at 993, 47 L.Ed.2d at 141.[9] Uncertainty is readily apparent based on the fact that trial counsel's investigation, aimed at "creating" a gun, (Pet. App. A77-79), did not begin until a month after the event, long after the victim's apartment had been cleared out. (Pet. App. A80, App. pp. 8-9). Thus, this Court is not bound to accept the conclusion that Respondent was going to perjure himself.

However, as the Court of Appeals stated:

> For the purposes of our analysis, we presume that appellant would have testified falsely. We recognize, of course, that the criminal defendants' privilege to testify in their own defense does not include the right to commit perjury. See *Harris* v. *New York*, 401 U.S. 222, 225, 91 S.Ct. 643, 645, 28 L.Ed.2d 1 (1971).

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[9] It would be incongruous for the Court to allow counsel to disbelieve his or her client on a less than beyond a reasonable doubt standard when the factfinder must apply that standard to the defendant's case. *In re Winship*, 397 U.S. 358, 363 90 S.Ct. 1068, 1072 25 L.Ed.2d 368, 375 (1970).

> However, the fact that appellant would have committed perjury does not mean that appellant has waived his right to a fair trial, due process or effective assistance of counsel.

Whiteside v. *Scurr*, 744 F.2d at 1328, citing *Lowery* v. *Cardwell*, 575 F.2d 727, 730 (9 Cir. 1978). The Court's assertion that a perjury determined client does not forfeit the right to the effective assistance of counsel is supported by this Court's decisions in *New Jersey* v. *Portash*, 440 U.S. 450, 99 S.Ct. 1292 59 L.Ed.2d 501 (1979) and *Harris* v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). In neither case was counsel chastised for allowing the defendant to present testimony that was more obviously perjured than that Respondent wished to give here. Portash had given conflicting testimony under oath, after a grant of immunity. *Portash*, 440 U.S. at 451-3, 99 S.Ct. at 1293, 59 L.Ed.2d at 505-6. Harris had given a voluntary, reliable statement to police. *Harris*, 401 U.S. at 224, 91 S.Ct. at 645, 28 L.Ed.2d at 4.

Further, Petitioner's assertion that a perjury determined client who refused to buckle under his attorney's threats has executed a Faretta-style waiver of counsel is simply not supported by that or any other of this Court's cases. (Pet's. Brief p. 39). This is especially true here where Respondent was never warned and questioned regarding the consequences of acting *pro se*. *Faretta* v. *California*, 422 U.S. 806, 835-6, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562, 581-2 (1975). Moreover, a "knowing, voluntary and intelligent" waiver of that right was not forthcoming because Respondent gave into trial counsel's wishes based, in part, on his desire not to lose the assistance of counsel. *Infra.*, pp.

Thus, assuming Petitioner was going to commit perjury, trial counsel's actions were not justified.

B. The Fact That Trial Counsel's Threats Were Not Disclosed To The Trial Court Or The Jury Did Not Limit Their Prejudicial Impact On Respondent's Right To Counsel.

Next, Petitioner contends that, because trial counsel's "admonitions" and his suspicion of perjury were not communicated to the trial judge or the jury, the trial process was not tainted. (Pet.'s Brief, p. 12). Petitioner appears to be contending that because Respondent did not call trial counsel's bluff and expose himself to the threatened consequences of his desired testimony, his rights were in no way harmed.

Initially, it should be noted that the Court of Appeals' preceived no difference, for Constitutional purposes, between counsel's threats and what the result would have been had counsel been forced to carry through on them. *Whiteside*, 744 F.2d at 1331. This is consistent with this Court's cases which have not required criminal defendants to suffer the consequences of unconstitutional restraints on their Fifth and Sixth Amendment rights in order to merit relief. *See New Jersey* v. *Portash*, 440 U.S. 450, 455-6, 99 S.Ct. 1292, 1295, 59 L.Ed.2d 501, 507-8 (1979); *Brooks* v. *Tennessee*, 406 U.S. 605, 611, 92 S.Ct. 1891, 1894, 32 L.Ed.2d 358, 363, N.6 (1972); *Ferguson* v. *Georgia*, 365 U.S. 570, 600-1, 81 s.Ct. 756, 772-3, 5 L.Ed.2d 783, 801 (1961), (concurring opinions.)

Moreover, it is incongruous to say that it is permissible to threaten to do an act which is impermissible to actually do. That is, a threat may be as persuasive as the act threatened. *See Miranda* v. *Arizona*, 384 U.S. 436, 448, 86 S.Ct. 1602, 1614, 16 L.Ed.2d 694-709 (1966).

Thus, the fact that trial counsel's belief in Respondent's planned perjury was not disclosed to the factfinder adds

nothing to Petitioner's argument because that was exactly the prohibited act trial counsel threatened to do.

Further, it is clear that, despite Petitioner's claims to the contrary, trial counsel's threats were not proper. Petitioner spends a significant portion of his brief discussing what an attorney may do when confronted with a perjury determined criminal defendant. (Pet.'s Brief, pp. 33).[10] As Petitioner correctly points out, having the defendant testify in a narrative fashion to his or her version of the events without counsel assisting in formulating or arguing that version to the jury has many flaws. Prominent among these is that it signals to the jury the lawyer's disbelief of the client's testimony. *See Johns* v. *Smythe*, 176 F. Supp. 949, 953 (E.D.Va. 1959).

Further, forcing a defendant to testify in narrative fashion, without the assistance of counsel, has been found by this Court to be a deprivation of the right of counsel. *Ferguson* v. *Georgia*, 365 U.S. 570, 596, 81 S.Ct. 756, 770, 5 L.Ed.2d 783, 798-9 (1961). Likewise, depriving the defense of closing argument violates the right to counsel. *Herring* v. *New York*, 442 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593, 600 (1975). *State* v. *Hendren*, 311 N.W.2d 61, 63 (Iowa 1981).

Petitioner contends that it is proper for a trial attorney in this situation to threaten to withdraw and inform the trial court of the nature of his or her suspicions. (Pet's. Brief, p. 30, 33-4).

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[10] Petitioner's suggestion that rules governing counsel's response to client perjury are best left to the States, (Pet's. Brief, p. 30), is perhaps unwise because, as noted in *Upjohn*, 449 U.S. at 393, 101 S.Ct. at 684, 66 L.Ed.2d at 593, predictability is essential to the effectiveness of the attorney-client privilege. "An uncertain privilege, or one which . . . results in widely varying applications by the Courts is little better than no privilege at all." *Id.*

The most obvious flaw in this "solution" is that an attorney cannot threaten a client with withdrawal, or any other abandonment of their relationship of trust, in order to exercise control over a decision that is the client's to make. *Downton* v. *Perini*, 511 F.Supp. 258, 267-8 (N.D. Ohio 1981). *See Jones* v. *Barnes*, ___ U.S. ___, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987, 993 (1983).

Next, all trial counsel's withdrawal accomplishes is that the problem is passed onto another attorney who the defendant may only give the most recent (perjured) version of the case to and, thus, be allowed to testify to that version. *See Newcomb* v. *State*, 651 P.2d 1176, 1181-3, N. 5 (Alk. App. 1982). Freedman, "Professional Responsibility of the Criminal Defense Lawyer — The Three Hardest Questions", 64 Mich. L. Rev. 1469, 1476. This "solution" in no way contributes to the fact-finding integrity of the court system upon which Petitioner bases his defense of trial counsel's actions.[11] In short, the remedy does not justify the problem.

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[11] Petitioner does not address the issue of what counsel does if the trial court denies the motion to withdraw. It has been suggested that, in light of the total unacceptability of forcing the defendant to testify by narrative without supporting argument by counsel, counsel could then proceed to let the defendant testify as he or she wished because, by alerting the trial judge, counsel has, at least, fulfilled his or her obligation to the court. *See Bowman*, "Standards of Conduct for Prosecution and Defense Personnel: An Attorney's Viewpont," 5 American Criminal Law Quarterly 28, 30 (1966).

The withdraw and disclose remedy, thus, appears to recognize that trial counsel has a value in his or her personal autonomy; a rather bizarre notion considering Petitioner's claim that a criminal defendant has no such entitlement. (Pet's. Brief, p. 33), citing *Morris* v. *Slappy*, 461 U.S. 1, 13, 14, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610, 621 (1983). *See United States* v. *Roberts*, 20 M.J. 689, 693 (A.C.M.R. 1985).

Even more important, however, is the fact that even if this Court were to approve of the withdraw and inform solution to the problem presented, Petitioner cannot prevail based on trial counsel's threat to "impeach" Respondent based on their confidential conversations. (Pet. App. A85). Despite Petitioner's protestations, none of the dissenting members of the Court of Appeals disagreed with the fact that trial counsel did, in fact, threaten to testify against Respondent; the most obvious meaning of trial counsel's words. But, even if counsel only meant to cross-examine Respondent, he would still be disclosing confidential information to the factfinder and communcating his disbelief of his client's testimony; the exact harm that the court's who have addressed this problem have all sought to avoid.[12] *Roberts*, 20 M.J. at 691; *Whiteside*, 750 F.2d at 714; *Butler*, 414 A2d at 852, 854; *Lowery*, 575 F.2d at 730; *Wilcox*, 555 F.2d at 122. Counsel's actions were especially flawed because no record was made as to whether he tried less severe ways to persuade Respondent, e.g. possible perjury prosecution, in order to get him to testify to what trial counsel believed the truth was.

Thus, it is clear that trial counsel did violate his relationship of confidence and trust with his client. His

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[12] Any suggestion by Petitioner, (Pet's. Brief, p. 43), or amicus parties, (ABA.p. 15), that an attorney could withdraw prior to trial and serve as a rebuttal witness at trial, and, thus, avoid a "musical chairs" in front of the jury, only begs the question because: (a) new counsel would be reduced to a "figurehead" as a prior attorney calls the client a liar based on confidential disclosures; (b) Petitioner's characterization of the "admonition" makes it certain that any impeachment would have taken place at the current trial; (c) as the ABA notes, this case does not raise the question of the extent of counsel's ability to disclose the perjury "after he has withdrawn as counsel." (ABA, p. 15 N.3).

threats were truly a violation of Respondent's right to the effective assistance of counsel.

C. The Court Of Appeals Properly Applied The Presumption Of Prejudice For Conflict Of Interest Cases.

Petitioner's next claim is that no prejudice was sustained by Respondent as a result of trial counsel's actions. The argument is twofold. First, Petitioner contends that the Court of Appeals erred in applying the presumption of prejudice for conflict of interest cases. *Whiteside*, 744 F.2d at 1330. (Pet's. Brief, pp. 19-23). Second, Petitioner avers that Respondent could not meet the actual prejudice test for ineffective assistance of counsel cases set out in *Strickland* v. *Washington*, ___ U.S. ___, ___, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984). (Petitioner's Brief, p. 23). A proper analysis of conflict of interest caselaw demonstrates that the Court of Appeals was correct.

"The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." *Von Moltke* v. *Gillies*, 332 U.S. 708, 725, 68 S.Ct. 316, 324, 92 L.Ed. 309, 321 (1948), citing *Glasser* v. *United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 465, 86 L.Ed. 680, 699 (1942). "Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision." *Van Moltke*, 332 U.S. at 725-6, 68 S.Ct. at 324, 92 L.Ed. at 322. *See Strickland*, 104 S.Ct. at 2063-5, 80 L.Ed.2d at 674-6.

Clearly, Respondent did not have an attorney devoted solely to the interests of his client and, thus, the Court of Appeals correctly applied the presumption of prejudice for conflict of interest cases. *Whiteside*, 744 F.2d at 1330.

The correct analysis for a deprivation of counsel claim based on conflict of interest is best set out by the remand court in *United States ex. rel. Sullivan* v. *Cuyler*, 553 F. Supp. 1236. 1241 (E.D.Pa. 1982):

> In his report, the Magistrate ably traced the evolution of the standard enunciated in *Cuyler* v. *Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) and the division opinion which its ambiguous language has spawned in the courts of appeals. He reasoned that the Court requires a finding of actual conflict which causes the attorney to choose a course of action adverse to his client's interests without the necessity of showing that the lapse in representation affected the outcome of the trial. Thus, because he found that counsel labored under conflicting duties (i.e. — to present exculpatory evidence on Petitioner's behalf through the testimony of the co-defendant yet to protect the codefendant from possible self-incrimination), and that counsel chose the latter course of action adverse to Petitioner's best interest, he concluded that the attorney's performance was adversely affected within the meaning of Sullivan. He declined to accept Respondent's argument advanced herein since it is "merely an attempt to redefine the Sullivan standard in terms of prejudice." Findings and Recommendation at 45. I fully concur with this analysis and adopt it herein.

The Court explained:

> The danger in Sixth Amendment terms to be identified by the Sullivan analysis is the causative effect on the lawyer's judgment of the conflicting interests. When the division in loyalty directly affects the lawyer's judgment, representation is per se ineffective and counsel is in essence denied altogether. This is because the "right to counsel guaranteed by the Sixth and Fourteenth Amendments contemplates the service of an attorney devoted solely to the interests of his client". *United States ex rel. Hart* v.

> *Davenport*, 478 F.2d 203, 209 (3rd Cir. 1973). Thus, it is the impaired loyalty itself; not the degree of incompetence produced by the impairment which violates the spirit of the Sixth Amendment. This view is evinced by the distinction drawn between conflict ineffectiveness and incompetence ineffectiveness.

Cuyler, 553 F. Supp. at 1241-2

Thus, the task here is to identify the conflicting interests and whether counsel's actions were affected by that conflict.

As observed by the United States Court of Appeals for the District of Columbia Circuit in *United States* v. *Hurt*, 543 F.d 162, 166 (D.C. Cir. 1976);

> To be sure, most conflicts of interest seen in criminal litigation arise out of a lawyer's dual representation of codefendants, but the constitutional principle is not narrowly confined to instances of that type. The cases reflect the sensitivity of the judiciary to an obligation to apply the principle whenever counsel is so situated that the caliber of his services may be substantially diluted. Competition between the client's interests and counsel's own interests plainly threatens that result, and we have no doubt that the conflict corrupts the relationship when counsel's duty to his client calls for a course of action which concern for himself suggests that he avoid.

In Hurt, 543 F.2d at 167-8, divided loyalty was found where appellate counsel was facing a libel suit filed by trial counsel based on an appeallate claim of ineffectiveness of trial counsel. Prejudice was presumed despite the fact that Hurt could point to no shortcomings in appellate counsel's representation. *Hurt*, 543 F.2d at 168.

Other courts have likewise applied the presumption of prejudice where trial counsel's personal interests conflicted with his or her duty of loyalty to the client. *See Virgin Islands* v. *Zepp*, 748 F.2d 125, 135-39 (3 Cir. 1984),

(counsel as witness exculpating self and inculpating defendant); *United States ex. rel. Simon* v. *Murphy*, 349 F. Supp. 818, 823 (E.D.Pa. 1972), (contingent fee agreement based on outcome of verdict); *Commonwealth* v. *Duffy*, 394 A.2d 965, 967-8 (Pa. 1978), (possibility of criminal charges against counsel); *People* v. *Meyers*, 263 N.E.2d 81, 82-3 (Ill. 1970), (potential contingent fee on related civil case affected by length of defendant's incarceration).

In the present case, it cannot be disputed that trial counsel's loyalty was split between his desire to do what he believed was demanded by ethical rules and his client's right to effective advocacy of his defense. This caused counsel to choose the path dictated by his personal interests in complying with what he believed the ethical rules required. Under *Cuyler*, then, the actual conlict of interest is shown as well as the fact that it adversely affected counsel's performance as an advocate. Petitioner's attempt to claim no "lapse of advocacy" based on the alleged strategic soundness of trial counsel's "admonitions", (Pet's. Brief, pp. 22-3), is "merely an attempt to redefine the Sullivan standard in terms of prejudice." This is a tactic rejected by the District Court in that case. *Cuyler*, 553 F. Supp. at 1241.

In sum, Respondent has shown that the Court of Appeals correctly applied the presumption of prejudice to what is clearly a conflict of interest case.[13]

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[13] Actual prejudice sufficient to undermine confidence in the verdict could be shown based on the importance of the actual existence of a weapon when one seeks to raise a claim of self defense to a murder charge. A successful defense of self-defense must be premised on four elements; the relevant one here whether petitioner had reasonable grounds for his belief that he was in imminent danger of death or great bodily injury. *State* v. *Haffa*, 246 Iowa 1275, 1289, 71 N.W. 2d 35, 43 (1955). It cannot be gainsaid that the reasonableness of one's

D. The Timing Of Respondent's Claims Is Of No Significance Under Three Circumstances.

Petitioner attacks the Court of Appeals's decision based on the fact that Respondent indicated his satisfaction with counsel at the close of trial and did not complain about the "admonitions" until after the verdict was reached. (Pet's. Brief, pp. 13, 45). This "fact" is completely irrelevant because, initially, sophisticated trial counsel is in a much better position to recognize a conflict of interest than a client. *Cuyler* v. *Sullivan*, 446 U.S. 335, 346-7, 100 S.Ct. 1708, 1717, 64 L.Ed.2d 333, 345-6 (1980). Next, Respondent was in no position to complain regarding trial counsel at that time because he had been previously told that ". . . your chances of getting another change of attorneys are about zero(?)." (Pet. App. A53). That is precisely why trial counsel's threats were so effective. Respondent did not wish to proceed pro se.

Clearly, the timing of Respondent's claim is of no relevance in this case.

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belief as to whether imminent danger is present is greatly affected by whether a gun is actually seen or only believed to be present. Trial counsel recognized this distinction. (Pet. App. p. 87). Respondent's desired testimony on this issue was crucial because he was the only one directly faced by the victim at the time Love arose from the bed. Also, the dimness of the light in the room could well have resulted in Respondent being the only person who saw the gun. Knowledge of this factor, when combined with Love's statement that he wanted his "piece" and his reputation for carrying guns, could well have changed the jury's verdict in favor of self-defense. Moreover, that evidence may have compelled the jury to find differently on the element of malice aforethought, due to the provocation from the presence of a gun, and Respondent would only have been convicted of manslaughter, a crime carrying a lesser penalty. *State* v. *Millspaugh*, 257 N.W.2d 513, 516 (Iowa 1977).

In sum, it has been shown that, based on the constitutional and societal interests involved and the specific facts of this case, the majority of the Court of Appeals was correct in holding that trial counsel improperly abandoned his duty of loyalty to his client and that, because the abandonment was the direct result of a conflict of interest, the presumption of prejudice was properly applied. The opinion of the Court at Appeals must be affirmed.

II. RESPONDENT WAS DENIED A FAIR TRIAL, DUE PROCESS OF LAW AND THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S CONDITIONING FURTHER REPRESENTATION ON THE CONTENT OF RESPONDENT'S TESTIMONY.

There can be no dispute that trial counsel directly threatened to abandon his sole as Respondent's advocate if Repondent testified as he wished. (Pet. App. A85). The Court of Appeals correctly found that this impermissibility forced Respondent to choose between his constitutional rights to counsel and to testify. *Whiteside*, 744 F.2d at 1329-30, citing, *United States ex. rel. Wilcox* v. *Johnson*, 555 F.2d 115, 120-1 (3rd Cir. 1977).

Clearly, a defendant has a due process right to testify in his or her defense. It has been recognized by this Court in *Jones* v. *Barnes*, ___ U.S. ___, ___ 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987, 993 (1983); *Faretta* v. *California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562, 572, N. 15, (1975); *Brooks* v. *Tennessee*, 406 U.S. 605, 612, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358, 364 (1972). ("whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."); *Harris* v. *New York*, 401 U.S. 222, 225, 91 S.Ct. 643, 645, 28 L.Ed.2d 1, 4 (1971); *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507,8, 92 L. Ed. 682 694 (1948). At least four Courts of Appeals have recognized the right. *Whiteside*,

744 F.2d at 1329-30; *United States* v. *Bifield*, 702 F.2d 342, 349 (2 Cir.) cert. deu. 103 S.Ct. 2095 (1983); *Alicea* v. *Gagnon*, 675 F.2d 913, 923 (7 Cir. 1982); *Wilcox*, 555 F.2d at 118-19. Even the dissenters below did not challenge this basic premise. *Whiteside*, 750 F.2d at 718, (Fagg, J. dissenting from denial of rehearing).

Further, the right to testify does not protect a defendant from all consequences of testifying falsely. The Court of Appeal's opinion does not dispute this. Clearly, a defendant may be punished with a perjury charge or enhanced punishment if he or she lies while testifying. *United States* v. *Grayson*, 438 U.S. 41, 53-4, 98 S.Ct. 2610, 2617, 57 L.Ed.2d. 582 (1978). Further, a testifying defendant may be impeached by prior inconsistent statements made to police. *Harris*, 401 U.S. at 225-6, 91 S.Ct. at 645-6, 28 L.E.2d at 4/5. However, nothing in these cases suggests that a client determined to commit perjury waives his or her right to the assistance of counsel. *Whiteside*, 744 F.2d at 1328,

This Court has held in the past that it is a violation of due process for a defendant to be forced to sacrifice one constitutional right to enforce another. *Simmons* v. *United States*, 390 U.S. 377, 393-4, 88 S.Ct. 967, 976, 19 L.Ed.2d 1247, 1259 (1968). Clearly, counsel's threats put before Respondent an intolerable "Hobson's choice" which was especially effective because Respondent had been told he would not be allowed to seek another substitute counsel. (Pet. App. A53). On these facts, there was no voluntary waiver of conflict-free counsel. *Faretta*, 422 U.S. at 835-6, 95 S. Ct. at 2541 45 L.Ed. 2d at 581-2.

Thus, the Court of Appeals correctly held that Respondent's rights to due process, a fair trial and the effective assistance of counsel were violated by trial counsel's forcing Respondent to choose between the exercise of

two constitutional rights. The decision of the Court of Appeals must also be affirmed on this ground.

CONCLUSION

The Court of Appeals recognized the importance of the role of counsel as an advocate and confidant in the American system of jurisprudence. Thus, the Court correctly concluded that counsel's threats to move to withdraw from his client's case, inform the trial judge that Respondent was going to commit perjury and testify against him reflected on actual conflict of interest that adversely affected his representation. Thus, the Court correct applied the presumption of prejudice based on this deprivation of counsel and held that Respondent should be given a new trial. *See Cuyler* v. *Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)

Any allegation that Respondent's alleged intention to commit perjury constituted a knowing, intentional and voluntary waiver of the right to counsel is without support in either the caselaw or the facts herein. See Faretta v. *California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Further, the Court of Appeals correctly found that counsel's threats resulted in a deprivation of his right to the effective assistance of counsel, due process and a fair trial because counsel conditioned his continued representation on the content of Respondent's testimony. Thus, Respondent was forced to choose between his constitutional right to counsel and his constitutional right to testify; an unconscionable choice.

Thus, this Court should affirm to the judgment of the Court of Appeals granting Respondent a writ of habeas corpus,

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

I, Patrick R. Grady, a member in good standing of the bar of the Supreme Court of the United States, do hereby certify that on July 23, 1985, I caused a copy of Respondent's Brief in the case of Nix v. *Whiteside*, No. 84-1321, to be sent by first class mail, postage prepaid to: Mr. Brent R. Appel, Deputy Attorney General of Iowa, Hoover State Office Building, Second Floor, Des Moines, Iowa 50319.

/s/_____

Patrick R. Grady

AFFIDAVIT OF SERVICE

State of Iowa

County of Linn

I. Patrick R. Grady, a member in good standing of the bar of the Supreme Court of the United States, do hereby depose that on July 23, 1985, I caused an original and one copy of Respondent's Brief in the case of Nix v. *Whiteside*, No 84-1321 to be sent by first class mail, postage prepaid to: Clerk, United States Supreme Court, Washington, D.C. 20543.

/s/_____

Patrick R. Grady
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Subscribed and sworn to before me by the said Patrick R. Grady on this 23rd day of July, 1985.

Julie A. Thompson
Notary Public